Supreme Court, U.S.
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No. 00-1620

IN THE

Supreme Court of the United States

FARRELL LINES INCORPORATED,

Petitioner,

v.

JOSEPH DINO, PATRICIA DINO, and AMERICAN MARITIME SERVICES OF NEW YORK, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONSE OF RESPONDENT AMERICAN MARITIME SERVICES OF NEW YORK, INC. IN SUPPORT OF PETITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent American Maritime Services of New York, Inc. (hereinafter "American") is a privately owned corporation that has no publicly traded stock.

REASONS FOR GRANTING THE WRIT

Respondent American supports the Petitioner's Petition For a Writ of Certiorari and agrees with the arguments set forth in the Petition. Respondent American is a maritime services contractor that was engaged by Petitioner to assist it in the removal of snow and ice from the deck of Petitioner's ship, the S/S ARGONAUT, to meet Petitioner's turnover duty under Section 5(b) of the Longshore and Harbor Workers' Compensation Act ("LHWCA").

A. The United States Court of Appeals for the Third Circuit has decided an important federal question in a way that conflicts with a federal statute and with decisional law of this Court interpreting that statute.

In reversing the district court's grant of summary judgment to Petitioner and Respondent American, the United States Court of Appeals for the Third Circuit is in direct conflict with Section 5(b) of the LHWCA (33 U.S.C. § 905(b)) and this Court's decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981).

Section 5(b) of the LHWCA, which Congress enacted in 1972, eliminated a longshoreman's right to recover from a shipowner for unseaworthiness, while preserving the longshoreman's right to recover from a shipowner for negligence. As Congress did not recite the acts or omissions of a shipowner that would amount to negligence, the scope of the duty owed to a longshoreman was left to "be resolved through the application of the accepted principles of tort law in the ordinary process of litigation." H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972). In 1981, this Court articulated the scope of the shipowner's duty to a longshoreman under Section 5(b), outlining three general duties a shipowner owes to longshoremen: (1) to turn the vessel over in a reasonably safe

condition or to warn of hidden danger; (2) to exercise due care to protect longshoremen from hazards when it maintains active control of the vessel during the stevedoring operations; and (3) to intervene when it has actual knowledge of a hazard and that the stevedore/employer cannot be relied upon to remedy it. *Scindia*, 451 U.S. at 166-167. This first duty, which has come to be called the "turnover duty," is the central issue in this matter. This Court in *Scindia* explained the turnover duty:

> This duty extends at least to exercising ordinary care under the circumstances to have a ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on his cargo operations with reasonable safety to persons and property and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

Id.

The United States Court of Appeals for the Third Circuit, in a decision issued in 1992 applying the *Scindia* turnover duty, held that a shipowner may be negligent for failing to eliminate an obvious hazard that could have been eliminated but only when it should have expected that an expert stevedore could not or would not avoid the hazard and conduct cargo operations reasonably safely. *Kirsch v. Prekookeanska Plovidba*, 971 F.2d 1026, 1031 (3d Cir. 1992). In *Kirsch*, the Court of Appeals affirmed summary judgment for the shipowner, holding that the shipowner was not negligent with regard to an oil spill in

the hold of a ship, as the longshoreman could have avoided the oil spill by either treating it with sawdust that was available to the stevedore or by requesting the ship's crew to do so. The Court of Appeals in *Kirsch* held that the shipowner was entitled to rely upon the expertise of the longshoremen to exercise reasonable care to carry on their cargo operations with reasonable safety to persons and property.

In reversing the district court's grant of summary judgment to Petitioner and Respondent American, the United States Court of Appeals for the Third Circuit has significantly departed from the turnover duty owed by the shipowner to longshoremen as it was enunciated by this Court in *Scindia* and further defined by its own decision in *Kirsch*. In the decision below, the Court of Appeals held there is no evidence that a longshoreman, Respondent Dino, could have avoided the ice. (App. A at 14a of the Petitioner's Writ of Certiorari). In so holding, the Court of Appeals requires a shipowner to bear the burden of presenting evidence that a longshoreman could have avoided the hazardous condition that was known to him. Therefore, the Court of Appeals is requiring that the shipowner bear the burden of proving it was not negligent, in contrast to the standard established by this Court in *Scindia*, under which a longshoreman must prove that the shipowner was negligent.

This is an important question of federal law, as Congress's enactment of the 1972 amendments to the LHWCA eliminated unseaworthiness as a basis for a shipowner's liability to a longshoreman or harbor worker, and this Court's decision in *Scindia* articulated the standards for shipowner liability based on negligence, including the turnover duty. The 1972 amendments and the *Scindia* negligence standards have since, i.e., for 20 years, governed the shipowner/longshoreman relationship in every port in this country. The decision of the United States Court of Appeals for the Third Circuit below would turn that relationship on its head by shifting the burden

to a shipowner to prove that it was not negligent, and therefore certiorari should be granted, so that this Court can reaffirm the standards for shipowner liability it established 20 years ago in *Scindia*.

B. The decision below also conflicts with a decision of another United States Court of Appeals addressing the same issue.

In *Delange v. Dutra Construction Co.*, 183 F.3d 916 (9th Cir. 1999), an injured worker brought an action against a barge operator seeking compensation under the Jones Act (46 U.S.C. § 688) and the LHWCA. The district court granted summary judgment for the defendant on both claims. The United States Court of Appeals for the Ninth Circuit affirmed the summary judgment for the defendant on the LHWCA claim but remanded the Jones Act claim for further consideration. *Id.* at 919.

With respect to the LHWCA claim, the only issue was whether the defendant satisfied its turnover duty. *Id.* at 921. The plaintiff had alleged that the accident that severed his fingers was caused by a hidden defect in the barge's spud mechanism. In particular, the plaintiff maintained that he had difficulty removing the pin, because it was bent, a defect he could not have identified in time to avoid the accident, as the pin was hidden in the spud. *Id.*

The United States Court of Appeals for the Ninth Circuit held that because the plaintiff had introduced evidence that the captain found no problems during an inspection of the barge and the tug on the morning of the accident, the plaintiff was required to offer evidence of specific facts showing his negligence claim was triable. *Id.* Moreover, the court noted that "when the nonmoving party relies only on his own affidavit to oppose summary judgment, '[he] cannot rely on conclusory

allegations unsupported by factual data to create an issue of material fact,' " *Id.* (quoting *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993)).

In its decision in this case, the United States Court of Appeals for the Third Circuit, in reversing a summary judgment entered by the district court in favor of Petitioner and Respondent American, has articulated a standard and burden for proof in turnover duty cases that directly conflicts with the rule enunciated by the United States Court of Appeals for the Ninth Circuit in *Delange*. Accordingly, this Court should grant the Petition for Writ of Certiorari filed by Farrell Lines, Inc. and address this important question of federal law.

CONCLUSION

For the reasons set forth above and in the Petition for a Writ of Certiorari, this Court should grant the Petition for a Writ of Certiorari to review the issues governing the proper burden of proof in longshore workers' third party actions.

Respectfully submitted,

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